

87-1217

Supreme Court, U.S.

FILED

NOV 10 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN AND NANCY LORENZINI

PETITIONERS,

v.

STATE OF NEW JERSEY

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
BERGEN COUNTY SUPERIOR COURT OF NEW JERSEY

JOHN and NANCY LORENZINI
16 NOTTINGHAM COURT
MONTVALE, N.J. 07647
(201) 573-0622 HOME
(201) 768-9789 WORK

15PV

QUESTIONS PRESENTED FOR REVIEW

1. After complying with the requirements to have a single attorney represent co-defendants (John and Nancy Lorenzini; husband and wife) can they be compelled by the State of New Jersey to retain separate counsel against their expressed wishes.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

JOHN and NANCY LORENZINI

PETITIONERS

v.

STATE OF NEW JERSEY

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
BERGEN COUNTY SUPERIOR COURT

The petitioners, John and Nancy Lorenzini, respectfully request that a writ of certiorari be issued to review the judgement of the Superior Court of New Jersey entered on October 16, 1985.

PRECEDING LITIGATION

Supreme Court of New Jersey denied petitioners motion of appeal on September 15, 1987. A copy of the denial is attached as Appendix A.

Superior Court of New Jersey Appellate Division denied petitioners motion for leave to appeal on December 30, 1985. A copy of the Order is attached as Appendix B.

CONSTITUTIONAL PROVISION INVOLVED

What is at stake is not the petitioners right to be represented by counsel but the right of a husband and wife to be represented by a single counsel of their choice if they so desire. This right of choice is voiced by several opinions from the United States Supreme Court.

STATEMENT OF THE CASE

On December 2, 1984 and December 3, 1984 eleven people were arrested and charged with gambling violations against the State of New Jersey.

By February 4, 1985 ten people were indicted on gambling violations. See Appendix C1 and C2 for specifics.

On February 25, 1985 Anthony Pace, attorney for John and Nancy Lorenzini, wrote Judge Alfred D. Schiaffo (presiding justice) of his clients desire to retain him as single counsel for both defendants. A copy of the letter is attached as Appendix D.

By September 1985 six defendants had pled guilty to various charges and were sentenced as follows:

Richard Yacovelli: Four years probation and a fine.

James Capuano: Four years probation and a fine.

Victor Moncaleri: Two years probation and a fine.

Donald Scheulen: Two years probation and a fine.

Thomas Scheulen: Two years probation and a fine.

Patrick Borzone Jr.: Two years probation and a fine.

On October 16, 1985 a 'Green Hearing' was held and John and Nancy Lorenzini were ordered to retain seperate counsel.

Petitioners made a timely appeal to the Appellate Division of the Superior Court of New Jersey. It was denied (See Appendix B).

Petitioners made an untimely appeal to the Supreme Court of New Jersey and were again denied. (See Appendix A).

Petitioners were again ordered by Judge Schiaffo to obtain separate counsel and be ready for trial by October 5, 1987 just four days after the denial from the Supreme Court of New Jersey. Trial date was extended to October 26, 1987.

REASONS FOR GRANTING THE WRIT

The fundamental purpose of a 'Green Hearing' is to inform both husband and wife of potential dangers from joint representation, discuss possible alternatives and then allow husband and wife to decide for themselves what defense best serves them. It is unusual after a Green Hearing to force a husband and wife to seek separate counsel; especially after their desire to have single counsel represent them

has been made a matter of record. Yet that is precisely what is being done and in a hasty matter.

The very case itself, State vs Green 129 N.J. Super, contains language and defense for co-defendants (husband and wife) to retain single counsel. I quote:

1. The Supreme Court has held that the sixth amendment right to fair and effective counsel can be abridged when several defendants are represented by one counsel. Glasser vs. United States, 315 U.S.60,62S.Ct.457,S6L.Ed.6S0 (1942). Although recognizing that this constitutinal right could be waived, the Court said any waiver must be made knowingly and intelligently ***

2. Recognizing that the right to such assistance of counsel may be waived (citation omitted).

3. Whenever an instance of dual representation appears, it would be appropriate for the court to conduct a voir dire at the earliest convenient time to

determine whether or not all defendants thus represented have been fully informed of the potential hazards of such a course. If they have been fully informed and still elect to proceed in that fashion, their willingness to do so should be made a matter of record. If this procedure is followed it will be unnecessary for an appellate division to decide on a silent record whether or not a defendant has been denied his constitutional right to effective assistance of counsel by joint representation.

After complying with the requirements why are the Lorenzini's not being allowed to proceed in their case with a single attorney of their choice or has the presumption of innocence gone by the wayside and been replaced by a

~~presumption of guilt~~
~~presumption of guilt~~ presumption of guilt.

In some of the very cases cited by the State vs. Green (ie. Glasser v. United States, Government of the Virgin Islands v. Hernandez, etc.) new trials would not have been ordered if

records had shown that all defendants represented were aware that joint representation had pitfalls and/or a waiver had been made a matter of record.

Quite the opposite is true here; a hearing was held and waivers were offered and made a matter of record.

CONCLUSION

John and Nancy Lorenzini respectfully request that the United States Supreme Court reverse the rulings in the lower courts, rule in their favor and allow them to proceed with one counsel to represent the both of them.

Thank you for your time and patience.

Respectfully yours,

John Lorenzini
John Lorenzini (pro se)

Nancy Lorenzini
Nancy Lorenzini

SUPREME COURT OF NEW JERSEY
M-70/71/72 September Term 1987

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

O R D E R

RICHARD YACOVELLI,

Defendant,

and

JOHN LORENZINI and NANCY LORENZINI,

Defendants-Movants.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal as within time (M-71) is denied; and it is further

ORDERED that the motion for stay (M-72) is denied; and it is further

ORDERED that the motion for leave to appeal is (M-70) is dismissed as moot.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, on this 11th day of September, 1987.

S - illegible
CLERK OF THE SUPREME COURT
OF NEW JERSEY

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CLERK OF SUPREME COURT

ORIGINAL ON FILE

App. - A

ORDER ON
MOTIONS/PETITIONS

STATE OF NEW JERSEY

vs.

RICHARD YACOVELLI, et als

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. AM-325-85T5

MOTION NO. M-1326-85

BEFORE PART D

JUDGES: MICHELS
DEIGHAN
STERN

MOVING PAPERS FILED

NOVEMBER 14, 1985

ANSWERING PAPERS FILED

DECEMBER 16, 1985 AND DEC. 19, 1985

DATE SUBMITTED TO COURT

DECEMBER 11, 1985

DATE ARGUED

DATE DECIDED

DECEMBER 30, 1985

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT
IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR LEAVE TO APPEAL
AND FOR STAY PENDING APPEAL

DENIED

SUPPLEMENTAL:

The motion is denied in all respects.

FOR THE COURT:

S - Herman D. Michels, P.J.A.D.

WITNESS, THE HONORABLE HERMAN D. MICHELS, PRESIDING
JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE
DIVISION, THIS 30TH DAY OF DECEMBER 1985.

S - Elizabeth McLaughlin
CLERK OF THE APPELLATE DIV.

OFFICE OF THE COUNTY PROSECUTOR
COUNTY OF BERGEN
Hackensack, New Jersey 07601
(201) 646-2300

Larry J. McClure
County Prosecutor

February 4, 1985

Honorable Donald W de Cordova
Judge, Superior Court
Hackensack, New Jersey 07601

Re: State v. Richard Yacovelli
Patrick Borzone, Jr.
James J. Capuano
Victor Moncalieri
Donald Scheulen

Thomas Scheulen
John Lorenzini, III
Sharon Lorenzini
Nancy Lorenzini
Nicholas Lorenzini
Lee R. Bondy

Dear Judge:

The following indictments were returned against the
captioned defendants: CHARGES:

1. Conspiracy to Promote Gambling (Bookmaking) 2C:5-2/2C:37-2
All defendants - 1 count each
2. Promote Gambling 2C:37-2
All Defendants - 1 count each
3. Maintaining Gambling Resort 2C:37-4a
Patrick Borzone, Jr. - 1 count
4. Maintaining Gambling Resort 2C:37-4b
John Lorenzini, III - 1 count
Nicholas Lorenzini - 1 count
5. Possess Gambling Records 2C:37-3
Richard Yacovelli - 1 count
James J. Capuano - 1 count
John Lorenzini, III - 1 count
Sharon Lorenzini - 1 count
Nicholas Lorenzini - 1 count

ORIGINAL ON FILE

App.-C1

P.O. 3367-84

6. Official Misconduct Over \$200 2C:30-2
Victor Moncalieri - 1 count

The following No Bill was voted in connection with the charge made against the captioned defendant:

CHARGE: (No Bill)

Maintaining Gambling Resort 2C:37-4b

Lee R. Bondy - count

Our office is retaining jurisdiction of the non-indictable complaints and disposition of same will be made upon disposition of the indictable offenses.

Unless the non-indictable complaints are returned to you for your attention, you may presume that they were disposed of upon disposition of the indictable offenses.

If you have any questions regarding the above defendants, please contact the undersigned.

Very truly yours,

Dominick P. Preziosi, Jr.
Assistant Prosecutor

cc: District Court; Criminal Part
cc: Defendants
cc: James Deer, Esq. (Borzone, Jr.)
cc: Robert Biagiotti, Esq. (D. Scheulen)
cc: Robert Galantucci, Esq. (T. Scheulen)
cc: Anthony Pace, Esq. (J. Lorenzini, III)
cc: (N. Lorenzini)
cc: Andrew Napalitano, Esq. (Bondy)

ORIGINAL ON FILE

App.-C2

ANTHONY J. PACE
Counsellor At Law

294 Harrington Ave.
Closter, N.J. 07624
(201) 767-1717

Mary Ann Pace Chase

February 25, 1985

The Honorable Alfred D. Schiaffo, J.S.C.
Bergen County Court House
Room 412
Hackensack, NJ 07601

Re: JOHN LORENZINI, III
NANCY LORENZINI - INDICTMENT NO. S-164-85

Dear Judge Schiaffo:

Pursuant to Your Honor's instruction and suggestion, I am writing this letter to request that Your Honor hold a Green Hearing at the earliest convenient date, so that both my clients, JOHN LORENZINI, III, and NANCY LORENZINI can advise the Court of their desire to have me continue as the Attorney representing both of them.

Please be advised that I have fully and completely explained to my clients, the Lorenzini's, the dangers and conflicts that may arise as a result of joint representation, and notwithstanding the fact, they have insisted that I continue as their attorney. We await the Court's pleasure concerning this application.

Thank you for your anticipated cooperation in this matter.

Respectfully yours,

S - ANTHONY J. PACE

AJP:rrm

cc: Patricia Baglivi, Prosecutor
Mr. and Mrs. J. Lorenzini, III

ORIGINAL ON FILE

App-D

I hereby certify that the following interested parties
were sent a copy by Certified Mail of the United States
Post Office:

Judge Alfred D. Schiaffo
Bergen County Court House
Hackensack, N.J. 07601

Bergen County Prosecutors Office
Bergen County Court House
Hackensack, N.J. 07601

Am. Leg. in.

Oct 20, 1987
Doris A. Heatherly

DORIS A. HEATHERLY
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAR. 15, 1989

Supreme Court, U.S.

FILED

APR 22 1988

JOSEPH F. SPANIO, JR.
CLERK

NO. 87-1217

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN LORENZINI and NANCY LORENZINI
Petitioners,

v.

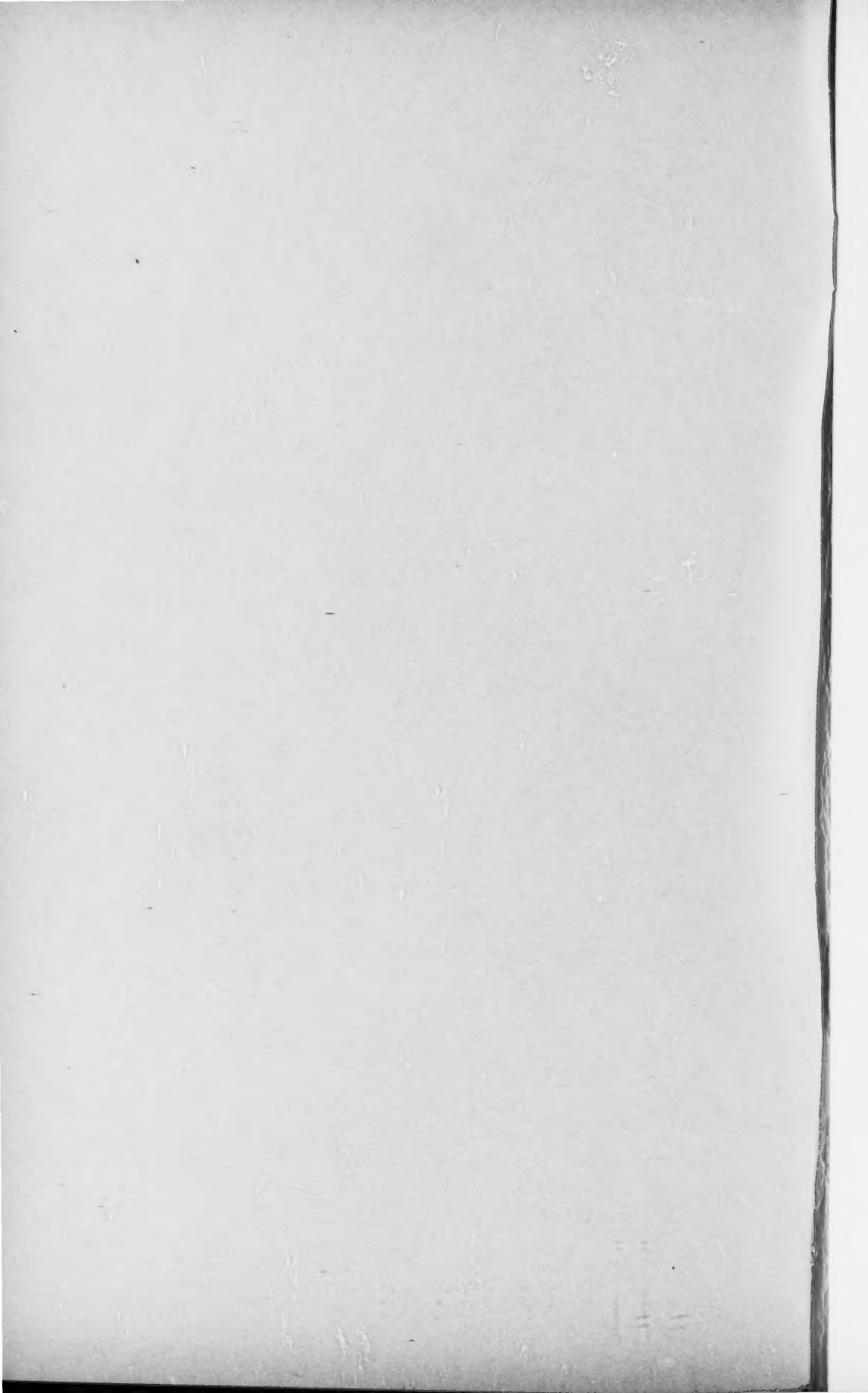
STATE OF NEW JERSEY
Respondent.

On Writ Of Certiorari To The Law
Division Of The Superior Court, Bergen
County, State of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

LARRY J. MC CLURE
Bergen County Prosecutor
Attorney for Respondent

SUSAN W. SCIACCA
Assistant Prosecutor
Bergen County Prosecutor's Office
Court House
Hackensack, NJ 07601
(201) 646-2300
Counsel of Record



QUESTION PRESENTED FOR REVIEW

May a trial court order co-defendants to obtain separate counsel in the face of what the court perceives as a conflict of interest, despite the defendants' waiver of their rights and insistence on joint representation?

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OPINIONS BELOW

The following proceedings of the New Jersey State courts are reproduced in the appendix to the petition for writ of certiorari: the order of the New Jersey Supreme Court denying leave to appeal and also denying the motion for leave to appeal as within time (App. A); and the order of the Appellate Division of Superior Court denying leave to appeal (App. B). These opinions are not published.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on September 11, 1987 and the petition for writ of certiorari was thereafter filed within time. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States,
Amendment VI

In all criminal prosecutions,
the accused shall enjoy the right...to
have the assistance of counsel for his
defense.

STATEMENT OF THE CASE

Petitioners John Lorenzini,
III, and Nancy Lorenzini, husband and
wife, were indicted by a Bergen County
New Jersey Grand Jury on February 4,
1985. Also indicted were eight other
people including two other Lorenzini
family members. All ten persons were
charged with conspiracy to promote
gambling and with promoting gambling.
The overt acts alleged in support of the
conspiracy mentioned John and Nancy
Lorenzini in the following paragraphs:

9. On November 26, 1984 at approximately 8:48 p.m. John Lorenzini, III, telephoned Richard Yacovelli over telephone facility (201) 768-0014. During the ensuing conversation John Lorenzini, III, placed illegal wagers for himself and others using the code name "John 9".

13. On November 26, 1984 at 7:02 p.m., Nancy Lorenzini telephoned Richard Yacovelli at telephone facility (201) 768-0014 and received the "line" and an illegal gambling figure representing proceeds of illegal gambling activities.

14. On or about November 29, 1984 telephone facilities were installed at 16 Nottingham Court, Montvale, New Jersey, the residence of JOHN and NANCY LORENZINI. NANCY LORENZINI discussed the calling of the Telephone Company with RICHARD YACOVELLI on or about November 26, 1984 and indicated that the phones would be in next week.

15. On November 29, 1984 at approximately 6:48 p.m., NANCY LORENZINI telephoned JAMES J. CAPUANO at telephone facility (201) 768-0014 and received the "line" for JOHN LORENZINI, III.

In addition, John Lorenzini was charged along with Nicholas Lorenzini with maintaining premises used for purposes of gambling activity. He was also charged with possession of gambling records. (Ral-Ra8) .

Following their indictment, the four Lorenzini family members met with Anthony Pace, Esq., who advised them that the charges were serious and that there would be a clear conflict in his representing all of them. Of these four persons, John and Nancy Lorenzini were reluctant to obtain separate counsel because of their financial situation and because they felt more comfortable with Mr. Pace as their attorney. He agreed to continue representation of the couple in the hope of arriving at a plea, but cautioned the Lorenzinis that the court would be likely to order separate counsel in the event of a trial.

When a plea agreement could not be reached, the Honorable Alfred D. Schiaffo, Judge of the Superior Court, held a hearing and ordered separate counsel despite the wishes of the Lorenzinis. Mr. Pace agreed to continue

representing John Lorenzini. The Lorenzinis decided to pursue a pro se interlocutory appeal of this order against the advise of Mr. Pace that it did not make economic sense and that he had anticipated the court's order from a legal perspective.

The Appellate Division denied the Lorenzinis' motion for leave to appeal on December 30, 1985. (App. B). The New Jersey Supreme Court denied review on September 11, 1987. (App.A).

On October 1, 1987, Justice William J. Brennan, Jr., denied a stay pending the timely filing of a petition for writ of certiorari. (Ra13). A similar application was denied on October 16, 1987 by the full Court. (Ra14).

On February 23, 1988, just after their trial had commenced, the petitioners, represented by separate

counsel, entered pleas of guilty. On March 30, 1988, John Lorenzini was sentenced to two concurrent one year terms of probation and a \$1000 fine and Nancy Lorenzini was sentenced to six months of probation and a \$1000 fine. (Ra15-Ra19). Petitioners have neither filed appeals from their convictions nor have they moved to withdraw their pleas.

SUMMARY OF ARGUMENT

The question presented by Petitioners is a significant one and is presently pending before this Court in another case. A decision on the merits must accommodate the competing interests posed by the right of a criminal defendant to choose counsel, the weight to be accorded his waiver and the need to ensure conflict-free representation. Despite the importance of the issue

presented herein, the present case is not an appropriate one for a grant of review both because the finality requirement has not been met in State court and because Petitioners entered guilty pleas without preserving their right to appeal.

ARGUMENT

THE TRIAL COURT CORRECTLY ORDERED PETITIONERS TO SECURE SEPARATE TRIAL COUNSEL.

Petitioners John and Nancy Lorenzini were indicted on charges of conspiracy to promote gambling and promoting gambling. In addition, John Lorenzini was charged with maintaining a gambling resort and with possession of gambling paraphernalia. A reading of the overt acts in support of the conspiracy reveals that Nancy Lorenzini allegedly obtained gambling information

(the "line") for John Lorenzini, who was the individual actually placing wagers on behalf of himself and others. She also arranged telephone lines for the Lorenzini home to facilitate the gambling enterprise.

Although the petitioners desired to proceed to trial with one attorney representing both of them, the trial court held a hearing at which it ordered the Lorenzinis to retain separate counsel. The trial court based its decision on a reading of the indictment, from which it concluded that husband and wife would have totally incompatible defenses. As the court explained, to successfully defend Nancy Lorenzini it would be necessary for the defense attorney to implicate John Lorenzini. Respondent agrees. From the indictment, it appears that Mrs. Lorenzini handled arguably

ministerial functions on behalf of the gambling operation whereas her husband was a more active participant. Her defense attorney might choose to assert that she was acting under the direction of her husband, but such a strategy could not be undertaken by an attorney who represented both parties, even if it were in the wife's best interests.

The petitioners were warned by the trial court of the pitfalls of joint representation but nonetheless waived their right to separate counsel. When the trial court refused to accept their waivers the petitioners sought appellate relief, culminating in the present petition for writ of certiorari. Meanwhile, after commencing trial--with separate counsel--they entered pleas of guilty and were sentenced.

Petitioners argue that they were denied their right to proceed with counsel of their own choosing. Respondent maintains that the trial court was correct in refusing to accept petitioners' waivers.

The Supreme Court of New Jersey has emphatically stated the problems inherent in joint representation of co-defendants:

The Sixth Amendment to the Federal Constitution and Art. 1, par. 10 of the New Jersey Constitution provide in nearly identical language that in a criminal prosecution the accused has the right to the "assistance of counsel" for his defense.[footnote omitted]. Mere literal compliance with these provisions would clearly frustrate the purpose and spirit of the right to counsel. Recognizing this, both the United States Supreme Court and this Court have repeatedly held that this fundamental guarantee of representation means the right to "effective assistance." See, e.g., Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 2d 680 (1941)*** A defense

attorney's representation must be "untrammelled and unimpaired," his loyalty undivided. See Glasser v. United States, 315 U.S. at 70*** The constitutional effectiveness of counsel therefore depends on his adherence to those ethical standards which serve to maintain his independent professional judgement.*** There is no greater impairment of a defendant's constitutional right to counsel than that which can occur when his attorney is serving conflicting interests. The resulting representation may be more harmful than the complete absence of a lawyer.

State v. Bellucci, 81 N.J. 531, 537-538, 410 A. 2d 666, 669-670 (1980).

In furtherance of this philosophy, as of September 10, 1979, the Rules Governing Criminal Practice in New Jersey prohibit individual attorneys and law firms from representing more than one defendant in a multi-defendant indictment without court permission. State v. Bellucci, 81 N.J. at 542, 410 A.2d at 671.

The United States Supreme Court

recognized the seriousness of an actual conflict of interest in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). When such a conflict exists, prejudice is presumed because counsel has breached "the duty of loyalty, perhaps the most basic of counsel's duties." 466 U.S. at 692, 80 L.Ed. 2d at 696. Not only does counsel have an obligation to avoid such conflicts, but the federal trial courts are given the ability by the Federal Rules of Criminal Procedure to make early inquiry in situations likely to give rise to conflicts. Id.

Unfortunately, this area of the law is not free of competing considerations. When courts are confronted with defendants who wish to proceed with a single counsel, they must

balance two concerns--the right to representation free of conflicts of interest and the right to counsel of one's own choosing. And, they must perform this balancing knowing full well that whatever their decision, there could be an appeal urging reversible error. United States v. Wheat, 813 F. 2d 1399, 1402 (9 Cir. 1987), cert. granted 108 S.Ct. 66 (1987). Beyond this, the problem with giving deference to a defendant's waiver is that it may be the product of unknown agreements, manipulation of testimony, the not disinterested advice of counsel, or the inability of the defendant to appreciate the significance of the decision he has made. Id. at 1403. Accordingly, several courts which have considered this issue have concluded that there will be instances in which a trial court may override a defendant's waiver and

order separate counsel. Id. at 1404;
United States v. Flanagan, 679 F.2d
1072, 1076 (3 Cir. 1982), rev'd on other
grds. 465 U.S. 259, 104 S.Ct. 1051, 79
L.Ed. 2d 288 (1984); United States v.
Dolan, 570 F.2d 1177, 1184 (3 Cir.
1978); United States v. Reese, 699 F.2d
803, 805 (6 Cir. 1983).

In United States v. Dolan,
supra, the Third Circuit Court of
Appeals pointed out the danger that the
waiver might not be intelligently and
knowingly made because the judge is not
in a position to inform the defendant of
the foreseeable prejudices of multiple
representation--the court not knowing
the available defenses and strategy at
the beginning of trial. Moreover, the
defendant may not be "competent enough
to understand the complex, subtle and
sometimes unforeseeable dangers..." 570
F.2d at 1181. Joint representation may

breach the lawyer's ethical code. It may also permit defendant to present a solid wall to prosecutors and thwart the public interest in crime investigation. Id. at 1182. Accordingly, when an actual conflict is found, the trial court must act to ensure the integrity of the proceedings, insulate itself from the future claim that the waiver was inadequate, exercise its supervisory power over the bar, and direct that separate counsel be obtained. Id. at 1184. The bottom line is that there is surely a right to counsel but there is no absolute right to the particular counsel of one's choice. Id. at 1183.

Respondent is not unmindful of the fact that there is disagreement among the courts concerning the standard to be applied in determining whether to override a defendant's knowing waiver. Compare United States v. Reese, 699 F.2d

803, 805 (6 Cir. 1983) [waiver must be honored in the absence of compelling circumstances and a mere belief that a conflict exists will not suffice to defeat defendant's right to choose counsel] with United States v. Flanagan, supra, 679 F.2d at 1076 [waiver may be overridden when the potential for actual conflict is very likely]. Respondent also acknowledges that there has been considerable longstanding controversy concerning the duty of the trial court to make an inquiry, the form of the inquiry, and the separate question of whether there has been an effective waiver. See United States v. Lawrie, 568 F.2d 98 (8 Cir. 1977), cert. den 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed. 2d 60 (1978) and the numerous cases cited therein. Finally, Respondent notes that this Court has granted review of this very issue in United States v. Wheat,

supra.

Despite the importance of the present issue, however, Respondent maintains that the case at bar is not an appropriate vehicle for granting review. There are two basic reasons for the State's conclusion: the lack of finality and petitioners' entry of guilty pleas.

**A. THE FINALITY DOCTRINE PRECLUDES
REVIEW.**

The present dispute stemmed from an interlocutory order of the trial court directing petitioners to retain separate counsel. Petitioners sought discretionary review from the Appellate Division of Superior Court and from the New Jersey Supreme Court, but these courts refused leave to appeal, thus declining to hear the merits of the controversy prior to trial. It was at that posture of their case that

petitioners sought review from the United States Supreme Court, but, as noted above, the petitioners eventually pleaded guilty in State court while the petition for certiorari was pending. Respondents contend that this Court lacks jurisdiction to hear this matter because the order of the trial court is not a final judgment or decree as required by 28 U.S.C. 1257 (3).

Under New Jersey practice, the petitioners presently have the right to file direct appeals from their convictions with the Appellate Division of Superior Court. At such time they will be able to raise any constitutional claim stemming from the proceedings below. Should they fail to prevail in the Appellate Division they also have a right to seek discretionary review by the New Jersey Supreme Court. Until petitioners have pursued these available

channels, there is no finality for purposes of federal appellate review. In no way have the appellate courts of New Jersey touched the federal issue presented herein, much less made a final determination on the merits.

The State fully realizes that the finality doctrine has not been construed rigidly but admits of various exceptions even when there are further proceedings available in State court. Pennsylvania v. Ritchie, ____ U.S. ____, 107 S.Ct. 989, 996, 94 L.Ed. 2d 40 (1987). Uniformly, however, the exceptions demand that the federal issue be finally decided in the highest court of the State. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 1037-1041, 43 L.Ed. 2d 328 (1975). The finality doctrine is not a "technicalit[y] to be easily scorned," particularly "when the jurisdiction of

this Court is invoked to upset the decision of a State court."

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945). Finality is essential to good judicial administration and "avoids the mischief of economic waste and of delayed justice." Id.

Although the merits of petitioners' federal issue have never been reached by a New Jersey appellate court, a channel is now open. The issue remains ripe for determination should petitioners file a direct appeal. Respondent maintains that the finality doctrine precludes review in these circumstances.

B. THE ENTRY OF GUILTY PLEAS PRECLUDES REVIEW.

The Respondent contends that

the petitioners waived their right to bring the present constitutional challenge by virtue of their guilty pleas.

On February 23, 1988 the petitioners interrupted their trial to enter unconditional pleas of guilty. Each petitioner was represented by counsel during the aborted trial and at the plea hearing. Thereafter, still represented by separate counsel, petitioners were each sentenced to terms of probation and fined.

It is well-settled that once a defendant enters a plea of guilty he may not raise claims relating to the deprivation of constitutional rights occurring prior to the plea. Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed. 2d 235 (1973). The

present petitioners made voluntary and intelligent choices to plead guilty while being represented by counsel. They have not alleged any defect in representation by these attorneys; nor have they alleged prejudice in the sense that counsel's ineffective performance affected the outcome of the plea process. Moreover, they have not moved to vacate their pleas. See Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 370-371, 88 L.Ed. 2d 203 (1985). Under such circumstances, the State cannot fathom petitioners' legal reasons for the pursuit of further review other than the vindication of an academic point.

CONCLUSION

For the reasons stated herein
the petition for a writ of certiorari
should be denied.

Respectfully submitted,

LARRY J. MC CLURE
Bergen County Prosecutor
Attorney for Respondent

BY: *Susan W. Sciacca*
SUSAN W. SCIACCA
Assistant Prosecutor
Bergen County Prosecutor's Office
Courthouse
Hackensack, New Jersey 07601
(201) 646-2300
Counsel of Record

APPENDIX

Ra 1

P.O. 3667-84

DP/bh

2/4/85

SUPERIOR COURT OF NEW JERSEY

BERGEN COUNTY-LAW DIVISION

JULY

TERM A.D. 1984

SECOND

STATED SESSION

THE STATE OF NEW JERSEY :

-vs- :

RICHARD YACOVELLI

PATRICK BORZONE, JR. :

JAMES J. CAPUANO

VICTOR MONCALIERI :

DONALD SCHEULEN

THOMAS SCHEULEN : Indictment No

JOHN LORENZINI, III

SHARON LORENZINI : S-164-85-07

NANCY LORENZINI

NICHOLAS LORENZINI :

DEFENDANTS :

_____ :

The Grand Jurors of the State of New
Jersey, for the County of Bergen, upon
their oaths present as a

FIRST COUNT

that RICHARD YACOVELLI, PATRICK BORZONE,
JR., JAMES J. CAPUANO, VICTOR
MONCALIERI, DONALD SCHEULEN, THOMAS

SCHEULEN, JOHN LORENZINI, III, SHARON LORENZINI, NANCY LORENZINI, and NICHOLAS LORENZINI, on, before, during and between November 26, 1984 and December 2, 1984, in the Boroughs of Northvale, Norwood, and Park Ridge, and other divers locations, in the County of Bergen aforesaid, and within the jurisdiction of this Court, with the purpose of promoting or facilitating within the State of New Jersey, the commission of the crime of promoting gambling, to wit, engaging in bookmaking to the extent of accepting or receiving in any one day more than five bets totaling more than \$1,000 on sporting events, did conspire and agree with each other and such other persons that they or one or more of them would commit the offense of promoting gambling, to wit, engaging in bookkeeping, or did agree to aid another person or persons in the

planning or commission of promoting gambling or an attempt or solicitation to commit such crime:

OVERT ACTS

AND in the pursuance of the aforesaid conspiracy and to effect the object thereof, the following overt acts were done:

* * *

9. On November 26, 1984 at approximately 8:48 p.m. JOHN LORENZINI, III, telephoned RICHARD YACOVELLI over telephone facility (201) 768-0014.

During the ensuing conversation JOHN LORENZINI, III, placed illegal wagers for himself and others using the code name "John 9".

* * *

13. On November 26, 1984 at 7:02 p.m., NANCY LORENZINI telephoned RICHARD YACOVELLI at telephone facility (201)

768-0014 and received the "line" and an illegal gambling figure representing proceeds of illegal gambling activities.

14. On or about November 29, 1984 telephone facilities were installed at 16 Nottingham Court, Montvale, New Jersey, the residence of JOHN and NANCY LORENZINI. NANCY LORENZINI discussed the calling of the Telephone Company with RICHARD YACOVELLI on or about November 26, 1984 and indicated that the phones would be in next week.

15. On November 29, 1984 at approximately 6:48 p.m., NANCY LORENZINI telephoned JAMES J. CAPUANO at telephone facility (201) 768-0014 and received the "line" for JOHN LORENZINI, III.

* * *

contrary to the provisions of NJS 2C:5-2/2C:37-2, and against the peace of this State, the Government and dignity of the same.

SECOND COUNT

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that RICHARD YACOVELLI, PATRICK BORZONE, JR., JAMES J CAPUANO, VICTOR MONCALIERI, DONALD SCHEULEN, THOMAS SCHEULEN, JOHN LORENZINI, III, NICHOLAS LORENZINI, SHARON LORENZINI and NANCY LORENZINI, on, before, during and between November 26, 1984 and December 2, 1984, in the Boroughs of Northvale, Norwood, and Park Ridge, and other divers locations, in the County of Bergen aforesaid, and within the jurisdiction of this Court, did promote gambling by engaging in bookmaking to the extent that they received or accepted in any one day more than five bets totaling more than \$1,000 or by engaging in conduct which materially aided said form of gambling activity, contrary to the provisions of NJS 2C:37-

2, and

against the peace of this State, the
Government and dignity of the same.

*

*

*

FOURTH COUNT

AND the Grand Jurors aforesaid, upon
their oaths aforesaid, do further
PRESENT that JOHN LORENZINI, III, and
NICHOLAS LORENZINI, on, before, during
and between November 26, 1984 and
December 2, 1984, in the Borough of
Northvale, in the County of Bergen
aforesaid, and within the jurisdiction
of this Court, while having substantial
proprietary or other authoritative
control over premises open to the
general public, to wit: LORENZINI's
RESTAURANT at Livingston Street,
Northvale, New Jersey, which was being
used with their knowledge for purposes
of gambling activity, they permitted

such to occur or continue or made no effort to prevent its occurrence or continuation, contrary to the provisions of NJS 2C:37-4b, and against the peace of this State, the Government and dignity of the same.

FIFTH COUNT

AND the Grand Jurors aforesaid, upon their oaths aforesaid, do further PRESENT that RICHARD YACOVELLI, JAMES J. CAPUANO, JOHN LORENZINI, III, SHARON LORENZINI and NICHOLAS LORENZINI, on or about December 2, 1984, in the Borough of Norwood and Northvale, in the County of Bergen aforesaid, and within the jurisdiction of this Court, did, with knowledge of the contents thereof, possess any writing, paper, instrument or article of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise, constituting, reflecting or representing

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more than five bets totaling more than \$1,000, contrary to the provisions of NJS 2C:37-3, and against the peace of this State, the Government and dignity of the same.

*

*

*

LARRY J. McCLURE
COUNTY PROSECUTOR

BY: Dominick P. Preziosi, Jr
Assistant Prosecutor

A True Bill

Wayne R. Foutch, Foreman

Ra 9

ANTHONY J. PACE
COUNSELLOR AT LAW

MARY ANN PACE CHASE

294 HARRINGTON AVENUE
CLOSTER, N.J. 07624
(201)767-1717

December 17, 1985

Honorable Herman D. Michels
155 Morris Avenue
3rd Floor
Springfield, NJ 07081

Honorable Joseph F. Deegan, Jr.
Court House
New Brunswick, NJ 08903

Honorable Edwin H. Stern
175 South Street
PO BOX 191M
Morristown, NJ 07960

RE: STATE V. YACOVELLI, et al
Indictment S164-85

Your Honors:

I submit the following response
to the Motion for Leave to Appeal
regarding the above case.

I was contacted by four members
of the Lorenzini family regarding their
arrest for the violation of various
gambling statutes in late November or
early December, 1984. I have known the
family for many years and the four came

to my office after their arrest. John Lorenzini and his wife, Nancy and Nicholas Lorenzini and his wife, Sharon, all came to see me together, regarding this matter and to discuss their defense to these charges.

At the initial conference I explained to all of the individuals the fact that these were serious charges and that there was a clear conflict in my representing all parties and recommended that they all obtain separate counsel. I gave them a name or names of attorneys that I felt would be able to assist them. John Lorenzini and his wife, Nancy, and I discussed, however, the possibility of my representing both of them on the matter as they were in serious financial difficulty and could not afford to hire separate counsel. We also discussed their ability to make application for an attorney through the Public Defender's Office. That suggestion again did not meet with great success and they felt more comfortable and confident with my representation.

We also discussed at our early conferences my firm belief that eventually if the matter was ever to go to trial, that the Court would order that one or the other of them would have to obtain separate counsel but I agreed to continue to represent both in hopes that some acceptable plea agreement could be worked out obviating the need for their retention of two attorneys.

A plea agreement could not be reached and at a continued Green hearing, the Honorable Alfred Schiaffo ordered me to discontinue representation of one of the Lorenzini's and to continue with the other, giving them the opportunity to elect. In further conversations with John and Nancy Lorenzini, it was agreed that I would continue to represent Mr. Lorenzini, but they both expressed much displeasure at the fact that the court had ordered one of them to obtain new counsel and, therefore, wished to appeal the trial court's decision.

I advised them that it did not make economic sense to take this appeal, as the money that they would expend to prosecute same would be sufficient to hire a new attorney. I was advised by John Lorenzini that since they had already taken a pro se appeal in a civil case, which is presently pending, they felt more than comfortable and confident to prosecute this appeal on their own, which they have done.

I cannot truly attest in any way to their financial dilemma and I am, of course, sensitive to the trial court's and the prosecution's concern regarding the joint representation. I wish Your Honors to know that on numerous occasions I advised and assured my clients [sic] that I expected if the circumstances lead to a trial, that the court would order prior to trial that the Lorenzini's obtain separate counsel.

I stand ready to abide by this Honorable Court's decision in the matter as, of course, I was prepared to do when

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the trial court rendered its decision.

Respectfully submitted,

ANTHONY J. PACE

AJP:mk

cc: Honorable Alfred Schiaffo
Patricia Baglivi, Asst. Pros.
Mr. and Mrs. Lorenzini

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OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

October 1, 1987

Mr. John Lorenzini
Mrs. Nancy Lorenzini
16 Nottingham Court
Montvale, NJ 07645

Re: John Lorenzini and Nancy
Lorenzini v. New Jersey, et al,
A-265

Dear Mr. and Mrs. Lorenzini

Your application for a stay
pending the timely filing and
disposition of a petition for a writ of
certiorari in the above-entitled case
has been presented to Justice Brennan,
who has endorsed thereon the following:

"Denied
Wm. J. Brennan, Jr.
10/1/87"

Very truly yours,

JOSEPH F. SPANIOL, JR., CLERK

BY

Edward L. Turner, Jr.
Assistant Clerk

cc: Susan Sciacca, Esq.

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OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

October 16, 1987

Mr. John Lorenzini
Mrs. Nancy Lorenzini
16 Nottingham Court
Montvale, NJ 07645

Re: John Lorenzini and Nancy
Lorenzini v. New Jersey,
et al., A-265

Dear Mr. and Mrs. Lorenzini:

The Court today entered the
following order in the above-entitled
case:

"The application for stay
addressed to Justice O'Connor and
referred to the Court is denied."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

BY

Francis J. Lorson
Chief Deputy Clerk

vjr

cc: Susan Sciacca, Esq.

Clerk, Supreme Court of New Jersey
(Your Nos. MO-70/71/72 Sept. Term
1987)

STATE OF NEW JERSEY

NEW JERSEY SUPERIOR COURT

v. Indt. S-164-85-07 Bergen County
LAW DIVISION-CRIMINAL

JOHN LORENZINI, III
Defendant

___ JUDGMENT OF CONVICTION

___ ORDER FOR COMMITMENT

315964a S.B.I.#
12/2/84 DATE OF ARREST
2/4/84 DATE INDICTMENT FILED
2/22/85 DATE OF ORIGINAL PLEA
XX NOT GUILTY ___ GUILTY

<u>ADJUDICATION BY:</u>	<u>DATE</u>
___ GUILTY PLEA	<u>2/23/88</u>
___ JURY TRIAL	_____
___ NON-JURY TRIAL	_____

ORIGINAL CHARGES _____

<u>Indictment No.</u>	<u>Count</u>	<u>Description</u>	<u>Statute</u>
s-164-85	1	conspiracy/ promote gambling	2C;5-2/37-2
	2	promote gambling	2C;37-2
	4	maintain gambling resort	2C;37-4b
	5	poss. gambling records	2C;37-3

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FINAL CHARGES guilty to ct.2 and 5 as
amended to 3rd degree.
2C:37-3

It is, therefore, on 3/30/88 ORDERED and
ADJUDGED that the defendant is sentenced
as follows:

Ct. 2 - Probation for 1 year.

Fine of \$1000 payable 1/3 by 4/15/88,
1/3 by 5/15/88, and 1/3 by 6/15/88.

Ct. 5 - Probation for 1 year, concurrent
to ct. 2.

Ct. 1 and 4 - dismissed on State's
motion.

\$50 - VCCB

NAME(Court Clerk or Person who prepares
this form)

RICH PELCHER

NAME(Attorney for Defendant at
Sentencing)

ANTHONY PACE

STATEMENT OF REASONS

Deft. has one prior DP in 1974. A
period of probation will be imposed for
the deterrence of the defendant.

A fine is specailly [sic] adapted
for the deterrence of this type of
offense.

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JUDGE(Name)

DATE

CHARLES R. DI GISI

4/4/88

STATE OF NEW JERSEY

NEW JERSEY SUPERIOR COURT

v. Indt. S-164-85-09 Bergen County
LAW DIVISION-CRIMINAL

NANCY LORENZINI

Defendant

___ JUDGMENT OF CONVICTION

___ ORDER FOR COMMITMENT

239438b S.B.I.#

12/3/84 DATE OF ARREST

2/4/85 DATE INDICTMENT FILED

2/22/85 DATE OF ORIGINAL PLEA

XX NOT GUILTY ___ GUILTY

ADJUDICATION BY:

DATE

___ GUILTY PLEA

2/23/88

___ JURY TRIAL

___ NON-JURY TRIAL

ORIGINAL CHARGES

<u>Indictment No.</u>	<u>Count</u>	<u>Description</u>	<u>Statute</u>
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s-164-85	1	conspiracy/ promote gambling	2C;5-2/37-2
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	2	promote gambling	2C;37-2
--	---	---------------------	---------

FINAL CHARGES Ct.2 as amended to 3rd
degree 2C:37-2 Promote
Gambling as D.P. charge.

It is therefore, on 3/30/88 ORDERED and
ADJUDGED that the defendant is sentenced
as follows:

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Ct. 2 - Probation for 6 months.
Fine of \$1000, payable at 1/3 by
4/15/88, 1/3 by 5/15/88 and 1/3 by
6/15/88 to Probation.

\$25 - VCCB

Ct. 1 - dismissed on State's motion.

NAME(Court Clerk or Person who prepares
this form)

RICH PELCHER

NAME(Attorney for Defendant at
Sentencing)

ADOLPH GALLUCCIO

STATEMENT OF REASONS

Deft. has no prior offenses. A
period of probation will be imposed for
the deterrence of this defendant.

A fine is specially adapted for the
deterrence of this type of offense.

JUDGE(Name)

DATE

CHARLES R. DI GISI

4/4/88